No. 80-432

Supreme Court, U. S.
FILED
OCT 20 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CITY OF NEWARK, a municipal corporation, CITY OF ELIZABETH, a municipal corporation, ESTHER G. BERTONI, LOUELLA DEVITA, LOIS BERTONI, LOUIS B. BERTONI, ESTHER G. BERTONI, STEPHEN DUDIAK and ESTELLE SMITH, Trustees under the Last Will and Testament of LOUIS P. BERTONI for the Benefit of LOUELLA DEVITA, LOUIS B. BERTONI and LOIS BERTONI; MARION BOSCIA; THE ESTATE OF DAVID COLEMAN; VINCENT P. MAZZOLA; SARA TACCETTA; ANTHONY TACCETTA, JR., BARBARA TACETTA SANTANGELO and FRANK STAMATO, partners trading as C & S DEVELEPMENT COMPANY; NEW JERSEY LAND TITLE INSURANCE ASSOCIATION, a New Jersey corporation,

Petitioners,

vs.

NATURAL RESOURCE COUNCIL IN THE DEPARTMENT OF ENVIRONMENTAL PROTECTION, as the tideland agent of the State of New Jersey; NAVIGATION BUREAU OF THE DIVISION OF MARINE SERVICES IN THE DEPARTMENT OF ENVIRONMENTAL PROTECTION, as the agent designated by N.J.S.A. 13:1B-13.2 for the performance of title studies and surveys of the meadowlands throughout the State of New Jersey; WILLIAM T. CAHILL, Governor of New Jersey, GEORGE F. KUGLER, JR., Attorney General, ROBERT J. FALCEY, Acting Secretary of State, WALTER WECHSLER, State Comptroller, WILLIAM E. MARFUGGI, State Treasurer, and EDWARD KILPATRICK, Acting Commissioner of Education, as the Trustees for the Support of Public Schools designated by N.J.S.A. 18A:56-1; and THE STATE OF NEW JERSEY,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

RESPONDENTS' BRIEF IN OPPOSITION

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Question Presented

Does not the decision of this Court in *State Land Board* v. *Corvallis Sand and Gravel Co.*, 429 U.S. 363 (1977) leave to state law the issue of title to riparian lands within the boundaries of the State of New Jersey?

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Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Natural Resource Council et als., respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Supreme Court of New Jersey's opinion in this case. That opinion is reported at 82 N.J. 544 (1980).

Statement of the Case

In 1967, in its decision in *O'Neill* v. *State Highway Department,* 50 N.J. 307 (1967), the New Jersey Supreme Court restated the New Jersey rule of sovereign ownership of tidelands in New Jersey, and indicated its desire that the State do what was feasible to catalog its extensive tidelands holdings. In response to this decision the New Jersey legislature directed designated State agencies to proceed with title studies and surveys of the State's meadowlands to determine which portions were State owned. The survey was intended to permit the State to indicate the extent of its claims, which would then be subject to appropriate administrative and litigative challenge.

A detailed history of the origins of this effort, and the basic methodology utilized by the State agencies in meeting the mandates imposed are set forth in the opinion of the New Jersey Supreme Court in the *City of Newark* case at Pet. A2 through A17.

The question perceived by the courts below as presented for adjudication was whether the claims maps developed by the agencies were

> ". . . promulgated and published in accordance with N.J.S.A. 13:1B-13.4, and represented a reasonable implementation of the mandated duty to prepare

such maps in accordance with N.J.S.A. 13:1B-13.2 and 13.3." Pet. A6

The limited nature of judicial response was noted by all three levels of the New Jersey courts. The Supreme Court, after affirming the decision below that the maps represented a reasonable implementation of the mandated duty, commented:

> "Finally, we note that the impact of these maps is limited. They set forth the State's claims. This is *not* a quiet title suit and these maps are *not* being measured against claims of private ownership in this case. . . . We cannot and do not find here that the State's claims are legally warranted in whole or in part as against other parties asserting ownership." Pet. A13.

In its briefs before the trial court, the appellate division and the Supreme Court of New Jersey, petitioners sought to raise collateral issues relating to the existence and applicability of the tidal test for sovereign ownership of riparian waterways which has long been in force in New Jersey. These were rejected by the courts at all levels. It is these latter arguments alone which now form the basis for the petition for writ of certiorari.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The applicability of the rule of sovereign ownership of riparian lands, based on tidal flow, recognized by the Legislature and courts as in force in the State of New Jersey, does not raise a substantial federal question essential to invoke the review of this Court.

Petitioners posit two questions which they assert are important federal questions to be settled by this Court. They first discuss the application of the equal footing doctrine to the nature and extent of sovereign ownership of lands under water within the boundaries of the State, and argue error in the consideration of this issue by the New Jersey Supreme Court. Specifically, petitioners point to the State's assertion that the tidal test, irrespective of navigability, has been and continues to be the rule in New Jersey and contend that in so ruling the State has departed from a purported federal common law requirement limiting the State's sovereign ownership claims to navigable, tide flowed waterways within its boundaries at the time of its entry into the union. Other than the applicability of this federal common law principle which appellants would impress upon this State under the equal footing doctrine, they raise no other federal interest which might justify the application of federal law.

Petitioners' insistence that the equal footing doctrine is controlling misapprehends the meaning and import of that principle. In *Coyle* v. *Smith,* 221 U.S. 559 (1911), this Court established the proposition that the equal footing doctrine prohibited the federal government from creating new states that were less sovereign than those already members of the Union. Further, in *United States* v. *Texas,* 339 U.S. 707 (1950), it was held that the equal footing doctrine also served to limit state intrusions upon national

sovereignty. However, neither *Coyle* v. *Smith* nor *United States* v. *Texas* intimates in any way that the equal footing doctrine limits a State's exercise of sovereignty within its own borders. The teaching of these cases is that the equal footing doctrine serves only to delimit the peripheries of state and national sovereignty by drawing boundary lines forbidding the intrusion of one into the exclusive province of the other.

In the recent decision of *State Land Board* v. *Corvallis Sand and Gravel Co.*, 429 U.S. 363 (1977) this Court held that in the case of riparian lands passing under the equal footing doctrine, as well as in the case of riparian lands which pass outside the equal footing doctrine, state law governs the issues relating to this property unless some other principle of federal law requires a different result.

> "Under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States. 'The great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state.' *Davies Warehouse Co.* v. *Bowles,* 321 U.S. 144, 155 (1944). This is particularly true with respect to real property, for even when federal common law was in its heydey under the teachings of *Swift* v. *Tyson,* 16 Pet (1842), an exception was carved out for the local law of real property. . . .
>
> This principal applies to the banks and shores of waterways, and we have consistently so held." Id. at pp. 378, 379.

Further focusing on this issue this Court said:

> "In *Shively* v. *Bowlby,* the Court canvassed its previous decisions and emphasized that state law controls riparian ownership. The Court concluded that grants by Congress of land bordering navigable waters 'leave the question of the use of the shores by the owners of uplands to the sovereign control of each State, subject only to the rights vested by the Constitution in the United States.'" Id. at pp. 379, 380.

In its statement of the law of New Jersey in the *City of Newark* decision the New Jersey Supreme Court said,

> "Sovereign ownership based on tidal flow, irrespective of navigibility, has been and continues to be the rule in this State." Pet. A15

This is the principle of New Jersey law which has continously governed the relationship between State and private ownership of riparian lands. Its restatement in the *City of Newark* case raises no substantial federal question.

2. No case, record or individual before this Court supports petitioners' contention that application of the long standing state rule of sovereign ownership has accomplished a retroactive divestiture of privately owned land.

A. No instance of actions taken in reliance upon any alleged modification of the rule of sovereign ownership presented for adjudication to the New Jersey courts has been raised in this case.

In the second part of its argument petitioners claim, erroneously (as may be seen by the citations in the *City of Newark* case set forth in the New Jersey Supreme Court's opinion at Pet. A15), that the court's first application of a tidal test to "interior meadowlands" in 1960 (Pet. A29, par. 6), represents ". . . a radical departure from the prior law of New Jersey on sovereign ownership and a radical departure from the State's administration of its riparian affairs from the time of the enactment of the Riparian Laws (N.J.S.A. 12:3-1 *et seq.*) in 1864 until the 1960s." (Pet. A26). This, it is argued, is a retroactive expansion of the State's sovereign ownership claims which violates the Fourteenth Amendment of the United States Constitution.

While the issue was raised perfunctorily in the petitioners' arguments below, an examination of the proposed findings of fact of the trial court, accepted and adopted *in toto* by the reviewing appellate court (Pet. A21), shows clearly the absence of any factual record before the trial court upon which petitioners' argument of divesture may be based. Thus, at Pet. A55, the trial court finds, in paragraph 8,

> "Appellants have not demonstrated any justifiable reliance by appellants upon any representation by the State limiting its tidelands claims."

and in paragraph 9 the trial court finds

> "Appellants have made no showing that any application for a grant of interior meadowlands was made to the State at any time, or that any grant of interior meadowlands was made pursuant to or in reliance upon the mean high water lines indicated on the Atlas sheets marked Exhibits A-33 to A-53."

And finally, in paragraphs 13 (Pet. A55) and 14 (Pet. A56) the trial court says:

> "Appellants have made no showing that the State made any representation or concealment of material facts relating to whether or not the lands which are the subject of this section were formerly flowed by the mean high tide at a time when the State possessed knowledge to the contrary.
>
> 14. There has been no showing that the State had any intention, expectation or reason to expect that any appellant in this action would act upon any such representation."

In the absence of any assertion of rights violated by the State's actions, and in the absence of any record in an individual case showing the divesture asserted here by petitioners, no issue relating to State action in contravention of the United States Constitution has been placed before the courts. Accordingly, no issue may be here raised for review.

B. The State of New Jersey did not expand its sovereign ownership claims as alleged by petitioners.

No new principles of law were declared by the court's current expression of the tidal rule. This rule has gov-

erned the decisions of the courts of the State of New Jersey for an extended period of time, and been uniformly applied to property ownership cases which came before the courts for adjudication from time to time.

The most comprehensive of the early statements of New Jersey's sovereign rights is contained in *Cobb* v. *Davenport,* 32 N.J.L. 369, 378-380 (Sup. Ct. 1867), cited by the New Jersey Supreme Court in *City of Newark,* (See Pet. A15). The case concerned ownership questions on a non-tidal navigable inland lake of sufficient depth to float large vessels. The court discussed the applicable test for determination of a public waterway:

> "The test by which to determine whether waters are public or private, is the ebb and flow of the tide. Waters in which the tide ebbs and flows—so far only as the sea flows and reflows, are public waters, and those in which there is no ebb and flow of tide, are private waters.
>
> * * *
>
> "And all the cases in which waters above the ebb and flow of the tide, such as the great inland lakes and the larger rivers of the country, are held to be public in any other sense than as being subjected to a servitude to the public for purposes of navigation are confessedly a departure from the common law." 32 N.J.L. at pp. 378, 379.

The Court is most precise concerning the nature and necessity for the tidal test applicable in New Jersey. It points out that in the State there is nothing in the topography or location requiring a departure from these rules, and succinctly declares:

> "Our system of land titles, and the decisions of our courts, have been in conformity with the common law on this subject. . . .
>
> * * *
>
> In these cases the tidal test, as distinguishing the *jus publicum* from the *jus privatum,* is recognized, and is assumed to be in force in this state." Id. at p. 380.

The detailed analysis of New Jersey law dealing with the State's title in its internal waterways set forth in *Schultz* v. *Wilson,* 44 N.J. Super. 591, 603, (App. Div. 1957) precedes not only a conclusion that the test to be followed in New Jersey is the tidal test, but also a specific reference to an argument proposing a dual test, and rejects the navigibility portion of such a test as unworkable and not suited to the state. Id. at pp. 603, 604. These clear enunciations of the New Jersey rule leave no doubt that the tidal test, as carried to this State during its colonial period, has been in force in the State of New Jersey throughout its existence as colony and state, and has been the basis on which extensive dealings in land titles have been based.

CONCLUSION

New Jersey's rule of sovereign ownership of tidelands within its boundaries is a matter cognizable under state law. This Court held in *State Land Board* v. *Corvallis Sand and Gravel Co.*, 429 U.S. 363 (1977) that state law governed issues relating to property within the boundaries of a state unless some other principle of federal law required a different result. The propriety and application of New Jersey's rules of reparian property law do not raise substantial federal questions for review by the Supreme Court of the United States.

Respectfully submitted,

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